Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	MM Docket No. 90-380
	)	
RIO GRANDE BROADCASTING CO.	)	File No. BPH-880815MV
	)	
ET. AL.	)	
	)	

For Construction Permit for
New FM Channel 247A
Rio Grande, Puerto Rico

To: The Commission

CONSOLIDATED REPLY TO OPPOSITIONS TO
JOINT REQUEST FOR APPROVAL OF SETTLEMENT AGREEMENT

SUMMARY

The requested dismissal of the applications of Passalacqua and McComas is consistent with Gonzalez Broadcasting, Inc., Heidi Damsky and Breeze Broadcasting Company, Ltd. and is in no manner precluded by the Auction Order. The requested dismissals will not require the resolution of any qualifying issue.

The requested dismissal of the applications of Passalacqua and McComas is consistent with 47 USC 309(j)(6)(E) and Congress' stated intentions regarding the proper application of auction procedures.

The issue regarding the dismissal of McComas' application has not been waived, was explicitly preserved by Passalacqua's Application for Review and must be addressed by the Commission.

Even if Cielo Communications is deemed good law, the circumstances of McComas' application, especially the lack of confusion regarding what was required and the lack of intention that the original signature on Form 396-A serve to certify the entire application, reflect significant distinctions, which preclude reliance upon Cielo.

Cielo was wrongly decided in any event and may not be relied upon. The interests necessitating the original signature requirement are not served by the "confines of the application" approach utilized by the Bureau in Cielo. Furthermore, the "confines of the application" approach is to be utilized only to resolve present, but inconsistent information, never to supply missing information and, thus, was improperly applied by the Bureau.

The Commission lacked the authority in 1988 to accept an application bearing facsimile signatures. That authority was not accorded the Commission by Congress until 1992.

There is no issue with regard to Petitioners' financial qualifications. No financial showing is required to be made by a entity formed through the merger of two financially qualified applicants.

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Rio Grande Broadcasting Company ("RGB") and United Broadcasters Company ("United") (collectively, "Petitioners') herewith submit their Consolidated Reply to the Oppositions to the Joint Request for Approval of Settlement Agreement, filed by Roberto Passalacqua ("Passalacqua") and Irene Rodriguez Diaz de McComas ("McComas"), as follows:

I. The Auction Order does not preclude dismissal of the applications of Passalacqua and McComas.

1. Both Passalaqua and McComas correctly apprehend that approval of the Joint Request and the proposed settlement is conditioned upon the dismissal of their applications. Both contend such action, regardless of its propriety on the merits, is precluded by the Commission's First Report and Order (FCC 98-194) in MM Docket No. 97-234, 13 FCC Rcd. 15920 (1998) (the "Auction Order").

2. As an initial matter, the action requested is not unprecedented. Following the adoption of the Balanced Budget Act the Commission has on at least three occasions considered proposed settlements conditioned upon the dismissal of a competing application, not party to the proposed settlement. Thus, in Gonzalez Broadcasting, Inc. (FCC 97-283), released August 12, 1997, 12 FCC Rcd. 12253, and Heidi Damsky (FCC 98-81), released May 6, 1998, 13 FCC Rcd. 11688, the Commission approved settlements involving less than all of the pending applications, while dismissing or denying those not party to the settlement. While the Commission refused to approve the proposed settlement in Breeze Broadcasting Company, Ltd., (FCC 98-286), released November 6, 1998, it did so only because of its determination that there existed no basis for disqualifying the sole applicant that was not party to the settlement, a determination made only after fully considering the challenge to that applicant's qualifications on the merits. While McComas seeks to distinguish Breeze Broadcasting Company, Ltd. on the basis that the settlement was filed prior to adoption of the Auction Order, such a distinction is without merit, inasmuch as the Commission's decision in Breeze Broadcasting Company, Ltd. was adopted more than two months after the release of the Auction Order. Furthermore, utilizing McComas' own calculation of the effective date of the Auction Order, the Commission's action in Breeze Broadcasting Company, Ltd. was undertaken after the effective

date of the Auction Order.

3. More significantly, however, both Passalaqua and McComas erroneously characterize the defects in their respective applications as basic qualifying issues. Thus, both rely upon language that reflects the Commission's intention to permit remaining applicants to participate in auctions "without regard to any unresolved issues...as to the basic qualifications of a particular applicant." However, in the case of Passlacqua, he was not disqualified below and the Petitioners do not seek his disqualification. Indeed, no issues were added regarding Passalacqua's basic qualifications nor has the denial of any requested issue been appealed. Instead, the Board dismissed Passalacqua's application as the result of his failure to demonstrate good cause for the acceptance of a site relocation amendment, premised upon an extreme and repeated pattern of lack of diligence. Rio Grande Broadcasting Co., (93R-45), released September 1, 1993, 8 FCC Rcd. 6256 (RB 1993).

4. Likewise, in the case of McComas, her application was dismissed as inadvertantly accepted for tender/filing because it was not signed by the applicant, as required by Section 73.3513(a) of the Commission's Rules and 47 USC 319(a). The issue is not whether McComas is qualified, but rather whether the Board erred in reinstating her application. Accordingly, the procedures adopted by the Commission in the Auction Order do not preclude the consideration and approval of the proposed settlement, which does not require the resolution of any

qualifying issues, but merely the dismissal of two remaining applications, both of which are fatally defective.

5. McComas' contention (at pp. 2, 6 & 10) that the proposed settlement would deprive the Treasury "of the benefits of an auction" reflects a misunderstanding of the purpose of the auction procedures. Both 47 USC 309(j) and the legislative history of the Balanced Budget Act of 1997 reflect that the auction procedures were adopted for the purpose of replacing comparative hearings and lotteries, not for the purpose of "benefiting" the Treasury, and were to be utilized only where mutual exclusivity could not otherwise be resolved. Indeed, 47 USC 309(j)(6)(E) specifically provides that the adoption of auction procedures does not relieve the Commission of "the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means to avoid mutual exclusivity in application and licensing proceedings." Furthermore, in expanding the Commission's authority to utilize auction procedures to include mass media services, Congress expressed concern that the Commission would misapprehend its intentions, in precisely the same manner as has McComas. Accordingly, the Congress explicitly reminded the Commission of its obligations under 47 USC 309(j)(6)(E) to utilize all reasonable means to resolve mutual exclusivity, prior to utilizing an auction:

> First, the conferees emphasize that, notwithstanding its expanded auction authority, the Commission must still ensure that its determinations regarding mutual exclusivity are

> consistent with the Commission's obligations under section 309(j)(6)(E). The conferees are particularly concerned that the Commission might interpret its expanded competitive bidding authority in a manner that minimizes its obligations under section 309(j)(6)(E), thus overlooking engineering solutions, negotiations, or other tools that avoid mutual exclusivity. See: Joint Explanatory Statement of the Committee of Conference at page 572 (copy attached).

Accordingly, the resolution of mutual exclusivity by means of settlement not only is consistent with applicable statute, but consistent with the clearly stated intention of Congress concerning the proper application of the Commission's authority to utilize auctions in the licensing of mass media services.

II. The Board erred in reinstating McComas' application.

6. McComas' contends that, even if the Auction Order does not preclude consideration of the settlement, there exists no basis for dismissing her application. [1]/ Initially, McComas challenges Petitioners' right to request dismissal of her application in the context of the Joint Request on the basis that United failed to file any application for review and that filed by RGB did not address McComas' application. However, as McComas acknowledges, the Application for Review filed by Passalacqua explictly challenged the Board's reinstatement of McComas' application and sought reversal of that action and dismissal of McComas' application, thereby preserving the issue. Accordingly, inasmuch as the issue has been presented to the Commission, it

1. Passalacqua does not address the merits of the request for affirmation of the dismissal of his application by the Board. The relevant issues have been fully addressed in the pending pleadings and in the Board's Decision.

has been preserved and, likewise, would have to be addressed by the Commission, even were the dismissal of Passalacqua's application to be affirmed.

7. McComas relies, as did the Board below, upon Cielo Communications, 3 FCC Rcd. 6752 (MMB 1988), a hearing designation order adopted by the Bureau, as well as the Commission's discussion of Cielo in Mary Ann Salvatoriello, et al. 6 FCC Rcd. 4705 (1991) and Dasan Communications Corp., 7 FCC Rcd. 7550 (1992) It must be emphasized at the outset that neither Salvatoriello nor Dasan are on point, nor did either rely for their result upon Cielo. [2]/ Instead, in each instance the Commission distinguished Cielo. Furthermore, as will be discussed in more detail below, Cielo also may be distinguished from the instant case and is bad law in any event.
In Salvatoriello, the only case cited by McComas or the Board below which involved the submission of facsimile signatures, all four applications were dismissed. In all other cases known to Petitioners, where applications have been submitted with facsimile signatures, they have consistently been dismissed. See, e.g.: SBM Communications, Inc., (FCC 91M-2576), released August 19, 1991; aff'd. 6 FCC Rcd. 6484 (RB 1991).

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2. In Salvatoriello four applications bearing facsimile signatures were dismissed. In Dasan an application bearing only an original site certification was dismissed. Neither Dasan nor Cielo involved the submission of facsimile signatures.

A. Cielo Communications does not support the Board's reinstatement of McComas' application.

8. Even if Ceilo is deemed good law, the particular facts presented by Ceilo are not present here, making the circumstances of McComas' case entirely distinguishable from those addressed in Ceilo. Unlike McComas, the applicant in Ceilo included at least one original signature at Section VII of Form 301. Unlike McComas, all signatures appearing on the application in Ceilo bore the same date. Unlike McComas, the original signature appearing on Form 396-A in Ceilo was a complete signature. Unlike McComas, there was evidence in Ceilo that the applicant had been confused by the similarity of the wording of the certification appearing at Section VII, Page 2, and that appearing on Form 396-A. Unlike McComas, the applicant in Ceilo had affixed an original signature to Form 396-A with the intention of certifying the entire application to which the Form 396-A was attached.

9. Justification of the Board's reinstatement of McComas' application on the basis of Ceilo would require evidence that McComas (a) confused the certification appearing on Form 396-A with Section VII, Page 2 of Form 301 and, thus, (b) affixed her original signature to Form 396-A with the intention of certifying the entire application. However, McComas professed no such confusion and the evidence belies the existence of any. McComas clearly recognized the need for her signatures at Section VII, Pages 1-2 of Form 301 for which she filed facsimile signatures on August 16, 1988 and originals a day later. McComas has never

contended nor is there any evidence, whatsoever, to support the contention that she intended her signature on the Form 396-A, Model EEO Program, annexed to the application, to serve as a certification of the entire application. Indeed, the submission of facsimile signatures on Section VII, Pages 1-2 of Form 301 belie any such notion. Furthermore, McComas confirmed at hearing that she had known that all three certifications were necessary and required to be accompanied by original signatures. (Tr. 496)

10. Furthermore, the original signature on Form 396-A, Model EEO Program, which was annexed to McComas' application, is dated August 15, 1988, while the facsimile signatures appearing at Section VII of Form 301 were dated August 16, 1988. In addition, while the application was filed under the name "Irene Rodriguez Diaz de McComas", the original signature appearing on Form 396-A is "Irene Rodriguez". [3]/ Finally, the original signatures which were submitted on August 17, 1988, although dated August 16, 1988, do not match the facsimile signatures submitted with the application on August 16, 1988, a fact which McComas confirmed at hearing. (Tr. 506-7) Thus, the facsimile signatures submitted on August 16, 1988 were facsimiles of original signatures other than those submitted on August 17, 1988.

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3. McComas confirmed this fact (Tr. 431-32) which is readily apparent when the original signature is compared to the facsimile signatures in Section VII of Form 301 as filed August 16, 1988 and the originals submitted the following day, all four of which reflect the applicant's complete signature: "Irene Rodriguez Diaz de McComas".

11. These numerous distinctions, especially the lack of confusion regarding what was required or intention that the signature on Form 396-A serve to certify the entire application, preclude any reliance upon Ceilo, which formed the sole basis of the Board's action, reinstating McComas' application. 4/

B. Cielo Communications was wrongly decided.

12. Even were the Board's reinstatement of McComas' application supported by Ceilo, which it is not, the Board's action should be overturned in any event, inasmuch as Ceilo was wrongly decided and is not good law. The principles emphasized by the Commission in Salvatoriello completely undermine the Bureau's holding in Ceilo.

13. In Salvatoriello the Commission plainly rejected any notion that a facsimile signature could be deemed adequate for

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4. The only confusion evidenced by McComas related to how the application came to be filed with facsimile signatures. McComas was unaware until after the Motion to Dismiss her application was filed that her application had been filed with facsimile signatures. (Tr. 463-64, 487, 489, 496-97) She testified that she had signed two complete copies of her application on August 15, 1988 and affixed that date to each by hand and, thus, two complete copies were "lost". (Tr. 428-9, 437-38, 465) At her deposition she claimed that the facsimile signatures dated August 16, 1988 were in fact signed on August 15th and repeatedly denied the possibility that she had re-executed those pages on August 16th or transmitted them by facsimile on that date. (Tr. 439-40, 443, 445, 447-48) However, at hearing McComas acknowledged signing pages 23 and 34 (Section VII) of FCC Form 301 on August 16, 1988, but was adamant that she signed only one set of certification pages on that day and that she did not re-execute the entire application on August 16, 1988. (Tr. 435-36; 486) Yet, McComas acknowledged that the facsimile signatures filed August 16th did not match the originals filed August 17th. (Tr. 506-7)

initial filing purposes. Id. at para. 7. The Commission explicitly held that a facsimile signature was the equivalent of no signature, rendering the needed signatures "missing," for purposes of tenderability analysis and requiring dismissal without further consideration. Id. at para. 11.

14. The Commission emphasized in Salvatoriello the crucial importance of original signatures with regard to the certifications required to be made in FM applications. The Commission emphasized that original signatures were necessary: (1) to avoid delays in the processing of applications, (2) to eliminate the possibility of forgery, or at least make it less likely that forgeries could go undetected, and (3) to assure that applicants could be held liable for misrepresentations.

15. With regard to the interest in avoiding delays, the Commission indicated that, if applications with facsimile signatures were accepted, the processing staff would be required to await the filing of the original and then compare the two to assure they matched, a procedure inconsistent with the purposes for establishing the hard look guidelines. Id. at para. 14. The need to eliminate or insure the detection of forgeries, likewise, necessitates original signatures:

> Applications containing only facsimiles of the applicants' signatures do not permit the Commission's staff to be reasonably certain, on the face of the applications submitted, that the applicants have reviewed the applications and verified their accuracy. A copy of a signature does not, for example, provide a reasonable assurance that the signature on the original application was affixed personally by the applicant and was not a stamp or photocopy affixed by someone else. Id. at para. 13.

> The requirement of an original signature can prevent or detect photocopy insertion, erasures, and other means of forgery that could otherwise go undetected. Due to the valuable nature of broadcast licenses, the potential for abuse of our application process through bogus signatures is quite real. Id. at Note 16.

The original signature requirement is also essential to assure that applicants can be responsible for false statements made in the context of their applications:

> Imposition of sanctions for false certifications would be problematic at best with only facsimiles of an applicant's signature. Id. at para. 14.

> An original signature can be important for criminal prosecution of applicants under 18 USC 1001, for false statements made on Commission applications...facsimile signatures might prevent or impede prosecution of applicants for false statements, by creating in every such case a potential issue as to the authenticity of documents filed with the Commission. Id. at Note 17.

16. In relying on Cielo, the Board ignored the Commission's statement in Salvatoriello of the interests which necessitate the original signature requirement and are intended to be served thereby. Thus, the acceptance of McComas' application on the basis of the original signature on the attached Form 396-A would require precisely the extra burden upon the processing staff which the Commission indicated it intended to avoid. Likewise, the interest in eliminating the possibility for forgery would be undermined. More important still, the submission of an original signature on an attached Form 396-A in no way serves to assure that an applicant can be held legally responsible for representations made in the remainder of the application. The

certification contained in Form 396-A relates solely to the information provided therein and does not purport to certify any of the representations appearing on Form 301 or the remainder of the application to which it may be attached. As such, McComas could not be readily prosecuted for any misrepresentations contained in her application (with the exception of the EEO portion), without addressing the significant questions which could be raised regarding the authenticity of the facsimile signatures, which, as the Commission observed in Salvatoriello, could as easily as not be forgeries, affixed without her knowledge. In this particular case the fact that the original signature was incomplete and was affixed (to Form 396-A) on the day prior to the date upon which the facsimile signatures were affixed (to Form 301) would only serve to increase the inherent uncertainty as to authenticity of the facsimile signatures. Thus, when the interests discussed in Salvatoriello are considered and fully appreciated, it is clear that the Board's action, reinstating McComas' application, was in error and that its dismissal by the Presiding Judge was fully consistent with Salvatoriello.

17. The interests which the Commission in Salvatoriello held necessitated the original signature requirement are inconsistent with the "confines of the application" approach utilized by the Bureau in Ceilo and implicitly relied upon by the Board in reinstating McComas' application. Furthermore, such an approach is inconsistent with the clearly enunciated policy set forth at

Appendix D of the Report and Order in MM Docket 84-750, 50 FR 19936 (1985), which established the tenderability requirements. Both the Bureau in Ceilo and the Board below ignored the fact that the provision in Appendix D for the resolution of present, but visibly incorrect or inconsistent information by "drawing on the application as a whole," does not apply to missing information. Appendix D, Report and Order, 50 FR 19936 (1985). As the Commission emphasized in Salvatoriello, an applicant's failure to provide an original signature with respect to any of the various certifications required to be included in the application renders the signature missing, the application unacceptable and requires its immediate dismissal. Salvatoriello at para. 11. Thus, inasmuch as the absence of an original signature constitutes missing (as opposed to present, but visibly inconsistent) information, the various certifications, which are required for tenderability, can never be inferred from the "confines of the application" as a whole.

18. In its Report and Order in MM Docket 84-750 the Commission established as a prerequisite for tenderability or substantial completeness that broadcast applicants include, as a part of their applications, certifications as to certain matters. At Paragraph 2 of Appendix D to the Report and Order the Commission indicated that certifications as to certain fundamental information required to be included in the application, including financial qualifications, site availability, compliance with 47 USC 310(b) and Section 73.3580,

were "crucial in the absence of full showings." Obviously, in the absence of an original signature at Section VII of the application, none of these crucial certifications can be found to be present in the application. The Commission made no provision for inferring the required certifications or any other missing information by drawing upon the application as a whole. Thus, in the absence of an original signature at Section VII of the application, all of the required certifications are effectively absent. If any required certification is missing, the application is to be returned. If inadvertently accepted, it is to be returned at such time as the noncompliance is discovered. That is precisely what occurred in this case.

19. The interests underlying the requirement for original signatures discussed by the Commission in Salvatoriello can never be served by the "confines of the application" approach adopted in Cielo, which is directly at odds with the Commission's stated interests in assuring that forgeries do not go undetected and that applicants can be held legally responsible and prosecuted for misrepresentations contained in their applications. Furthermore, such an approach is clearly inconsistent with the Commission's own clearly enunciated policy, that the "confines of the application" approach would never be applied to supply information which was missing, but only with regard to present, but visibly incorrect information. Where required certifications are missing, they simply cannot be inferred, consistent with the established hard look policy, based upon the confines of the

application approach. Therefore, Cielo is bad law and the Board erred in relying upon it and in reinstating McComas' application.

C. The Commission lacked authority in 1988 to accept facsimile signatures.

20. In 1988, when McComas filed her application, the Commission lacked authority to accept or grant her application, inasmuch as the Commission lacked authority to accept applications accompanied by facsimile signatures. It was not until 1992 that Congress granted the Commission the authority to accept facsimile signatures on applications for construction permit. See: Public Law 102-538, Section 204(c), 106 Stat. 3543 (1992). Furthermore, 47 USC 319(a) requires that the application be signed, not merely an attachment to the application, such as Form 396-A. Given its lack of authority to accept or grant an application accompanied by a facsimile signature, the Commission may not simply waive its rules in this instance. Accordingly, inasmuch as it was neither acceptable for tender nor filing nor grantable, McComas' application was properly dismissed by the Presiding Judge as inadvertently accepted. [5]/

III. Petitioners' financial qualifications are not at issue.

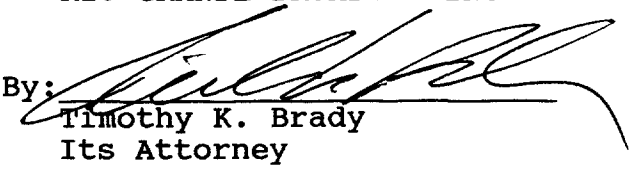
21. McComas argues (at page 13) that the proposed settlement may not be approved because there has been no demonstration that

5. The inadvertent acceptance of McComas' application for tender and filing did not preclude its subsequent dismissal, once it was determined not to be in accordance with the Commission's Rules and the Communications Act. See: 73.3564(b). See also: Pueblo Radio Broadcasting Service, 5 FCC Rcd. 6278 (1990).

the merged entity would be financially qualified. However, in Breeze Broadcasting Company, Ltd., (FCC 98-286), released November 6, 1998, the Commission held that such a showing is not required with respect to an entity consisting of two financially qualified applicants. Id. at paragraph 8 ("Miller has shown no basis to require any specific demonstration of financial qualifications by an entity formed through the merger of two financially qualified applicants."). Accordingly, McComas' final objection also is without merit.

Respectfully Submitted

RIO GRANDE BROADCASTING CO.

By: 
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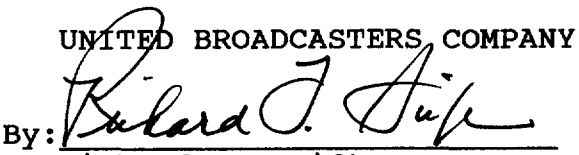
By: 
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JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 2015) to provide for reconciliation pursuant to sections 104 to 105 of the concurrent resolution on the budget for fiscal year 1997, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

CONFERENCE AGREEMENT

Section 3002(a)—Extension and expansion of auction authority

The Senate recedes to the House with amendments on the extension and expansion of the Commission's competitive bidding authority. First, the conferees emphasize that, notwithstanding its expanded auction authority, the Commission must still ensure that its determinations regarding mutual exclusivity are consistent with the Commission's obligations under section 309(j)(6)(E). The conferees are particularly concerned that the Commission might interpret its expanded competitive bidding authority in a manner that minimizes its obligations under section 309(j)(6)(E), thus overlooking engineering solutions, negotiations, or other tools that avoid mutual exclusivity.

Second, the exemption from competitive bidding authority for "public safety radio services" includes "private internal radio services" used by utilities, railroads, metropolitan transit systems, pipelines, private ambulances, and volunteer fire departments. Though private in nature, the services offered by these entities protect the safety of life, health, or property and are not made commercially available to the public. This service exemption also includes radio services used by not-for-profit organizations that offer emergency road services, such as the American Automobile Association (AAA). The Senate included this particular exemption in recognition of the valuable public safety service provided by emergency road services. The conferees do not intend this exemption to include internal radio services used by automobile manufacturers and oil companies to support emergency road services provided by those parties as part of the competitive marketing of their products. The conferees note that the public safety radio services exemption described herein is much broader than the explicit definition for "public safety services" contained in section 3004 of this title (adding new section 337(f)(1) to the Communications Act).

The Senate recedes to the House on the omission of an auction exemption for licenses to offer global satellite services. The conferees note that this omission should not be construed as a Congressional endorsement of auctions for licenses to offer global satellite services. The treatment of global satellite systems raises numerous public policy questions beyond the issue of spectrum auctions. These issues are not germane to budget legislation and are better handled in the context of substantive legislation.

The Senate recedes to the House with regard to the provision that requires the Commission to conduct a test of combinatorial bidding. The conferees expect that the Commission will conduct the contingent combinatorial auction required by this section as soon as possible. The Commission should, consistent with non-discriminatory procedures for government procurement of goods and services, test methods available in the private sector which may assist the Commission in successfully conducting competitive bidding. The conferees also expect that the Commission will provide a report to the Congress on the outcome of that test. Such report shall include a detailed analysis of the impact of such bidding on the ability of small businesses and new entrants to participate effectively in the bidding process.

Certificate of Service

I, Denise A. Branson, paralegal in the law firm of Tierney & Swift, hereby certify that on this 29th day of December, 1998 true and correct copies of this **CONSOLIDATED REPLY TO OPPOSITIONS TO JOINT REQUEST FOR APPROVAL OF SETTLEMENT AGREEMENT** were sent via First Class U.S. Mail to the following:

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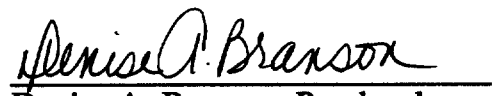

Denise A. Branson, Paralegal

* By hand